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No. 96-1103

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

MISSOURI PACIFIC RAILROAD COMPANY d/b/a UNION PACIFIC RAILROAD COMPANY
a Delaware Corporation

Petitioner,

v.

JAMES M. JOHNSON and FRANCIS L. JOHNSON, as Representatives of the ESTATE OF JEREMY MICHAEL JOHNSON, Deceased,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma

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PETITIONER'S REPLY BRIEF

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REPLY BRIEF FOR PETITIONER

Petitioner, Missouri Pacific Railroad Company, d/b/a Union Pacific Railroad Company ("Missouri Pacific") submits this Reply Brief to the Respondents' Brief in Opposition to the Petition for Writ of Certiorari, which seeks review of an order of the Supreme

Court of the State of Oklahoma, denying review of an opinion of the Court of Appeals of the State of Oklahoma.

REPLY TO RESPONDENTS' STATEMENT OF FACTS

Respondents have included in their Statement of the Case numerous misstatements of fact. Missouri Pacific will summarize the most significant inaccuracies.

1. ***The Performance of the Train Whistle.*** Respondents' statement that "[t]hey never heard a whistle" is inaccurate in that the it infers that the train whistle was not blown by the train crew, or if blown, was not heard by Jeremy Johnson. Six Fort Gibson city residents testified that they heard the train whistle at the time of this collision.

2. ***The Alleged Agreement Between the Railroad and City of Fort Gibson.*** Respondents' statement that the Railroad and the City entered into an agreement concerning train speed and crossing improvements is inaccurate. The City's ordinance restricting train speed through Fort Gibson to 20 mph was passed in 1972, but raised to 40 mph, after discussions with unidentified attorneys allegedly representing the Railroad. The minutes indicate that "the Board voted to raise the speed limit and the Railroad will *investigate the possibility* of correcting some blind corners at crossings". In fact, the Railroad did substantially improve this crossing after a 1972 accident.

3. ***The Crossing and Corridor Project.*** Respondents' statements concerning the extrahazardous nature of the crossing is inaccurate. Prior to Jeremy Johnson's accident, there had been only one known automobile/train accident in the city which happened at this crossing in 1972. The Manager of Rail-Highway Safety for the Oklahoma Department of Transportation testified that the crossing was not high on the Department's priority index. None of the Fort Gibson crossings would have qualified for improvements under the Department's priority list. Fort Gibson was selected for a corridor project because the city had several crossings within a short track distance, some of which could be consolidated and eliminated. The Railroad had no reason to believe that this crossing was more hazardous than any other crossing in the city, and no one from the Railroad testified to the contrary.

4. ***Respondents' Allegation that the Railroad Delayed Safety Improvements at the Crossing.*** Respondents' statement that the Railroad delayed improvements at the crossing is inaccurate. If not for the Corridor Project, as requested by the Railroad, the Department of Transportation would not have improved this crossing. The Department of Transportation discourages independent action by railroads. Even if a railroad acted independently, it still would have to proceed through the normal regulatory process to gain agency approval before upgrading a crossing.

The facts listed in Respondents' Statement of the Case are not relevant and only serve as a distraction to the issue presented by Missouri Pacific. The issue remains one of federal law. The question presented is: *Does the Federal Railroad Safety Act preempt*

all municipal ordinances which purport to govern the speed of trains through towns and cities in the United States?

RESPONDENTS PRESENT NO VALID REASON FOR EXEMPTING A MUNICIPALITY FROM THE FEDERAL RAILROAD SAFETY ACT.

Summary of Argument

The arguments of the Respondents do not refute the legal arguments or authority presented to this Court in Missouri Pacific's main brief. Respondents only present arguments designed to circumvent the issue of federal preemption. Contrary to Respondents' position, there are several compelling reasons for this Court to review the opinion of the Oklahoma Court of Appeals. The Oklahoma opinion will create a conflict between federal and state law on a substantial issue of federal law. The Oklahoma opinion will unreasonably burden interstate commerce by allowing towns and cities in Oklahoma to regulate train speed on interstate trains. Separate municipal regulations of speed would undermine safety, and as such, merits the determination of this Court.

I. THERE ARE COMPELLING REASONS TO REVIEW THE UNPUBLISHED OPINION OF THE OKLAHOMA COURT OF APPEALS.

The Oklahoma opinion will have an "persuasive effect" creating a conflict between federal and state law. The United States Supreme Court has held that judgments of intermediate appellate courts were judgments of the highest court of the state, under the

provisions of 28 U.S.C. § 1257, where discretionary review of the judgments of the intermediate appellate courts had been denied by the highest court of the state. *American Ry. Express Co. v. Levee*, 263 U.S. 19 (1923); *Bacon v. Texas*, 163 U.S. 207 (1896). Unpublished opinions may be cited for the persuasiveness of their reasoning. *Hupman v. Cook*, 640 F.2d 497 (Va. 1981); *Taco Bell v. City of Mission*, 678 P.2d 133 (Kan. 1984). An unpublished opinion may be cited for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case. *Time, D.C. Freight Lines v. Industrial Com'n of Arizona*, 713 P.2d 318 (Ariz. Ct. App. 1985); *Smith v. Warbasse*, 526 A.2d 991 (Md. Ct. Spec. App. 1987). In Oklahoma, unpublished opinions are frequently attached to a brief in an effort to provide a court with as much information as possible on the issues in controversy.

Federal Courts have held that if counsel believes that an unpublished disposition has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such decision may be cited if counsel serves a copy thereof on all other parties in the case and on the court. *Baer v. R & F Coal Co.*, 782 F.2d 600 (6th Cir. 1986). State courts have also held that prior unreported cases of an appellate court may be cited by such court and may be relied upon as authority and precedent by the trial court and by counsel. *State v. George*, 362 N.E.2d 1223 (Ohio Ct. App. 1975).

Respondents fail to mention that the Oklahoma decision can be cited for its persuasive effect and precedential value in relation to a material issue in a case. A cursory review of cases cited in

Oklahoma opinions shows that unpublished opinions are often cited for their persuasive or precedential effect.

Respondents' most blatant misstatement is their argument that the Oklahoma decision follows *Easterwood*. *CSX Transportation v. Easterwood*, 507 U.S. 658 (1993). The Oklahoma Decision did not correctly cite, apply, or follow *Easterwood*. It is difficult to understand how the Respondents could argue that a court which not only allows the introduction of evidence regarding excessive train speed and a municipal ordinance restricting train speed, but also allows the submission of negligence *per se* and punitive damage instructions regarding the municipal ordinance and train speed correctly applied *Easterwood*. The federal rule is that municipalities cannot be exempt from the provisions of the FRSA.

II. OKLAHOMA HAS NOT ADOPTED ANY LAW WHICH WOULD DEFEAT PREEMPTION.

Congress expressly intended that the Federal Railroad Safety Act (the "FRSA"), formerly 45 U.S.C. §§ 421-447 (1986), now recodified at 49 U.S.C. §§ 20101-26102 (1994), preempt all railroad safety legislation except *state law* governing an area in which the Secretary of Transportation has not issued a regulation or order or *state law* more strict than federal regulations when necessary to address *unique* local problems. 49 U.S.C. § 20106. Respondents have totally mischaracterized the Railroad's discussion of the preemptive effect of the FRSA. The Railroad agrees that the FRSA allows a state law to continue in force ***if*** the requirements of 49 U.S.C. § 20106 are met. A *state* may adopt or continue in force an additional or more stringent law, regulation or order related to

railroad safety *so long as* the law, regulation or order: (1) is necessary to eliminate or reduce essentially locally safety hazards; (2) is not incompatible with a law, regulation, or order of the United States government; and (3) does not unreasonably burden interstate commerce. 49 U.S.C. § 20106. These exceptions apply only to a "*State*". Only when a state law meets all three requirements set forth in § 20106 does preemption not occur. *See Wright v. Illinois Central R..R Co.*, 868 F. Supp. 183 (S.D.Miss. 1994); *Smith v. Norfolk & Ry. Co.*, 776 F. Supp. 1335 (N.D.Ind. 1991).

The State of Oklahoma ***has not*** adopted a more stringent law, regulation or order in this case, and therefore, the exceptions allowed under 49 U.S.C. § 20106 need not be addressed.

A. State Delegation of FRSA Authority to Municipalities is Impermissible.

Respondents argue that the State of Oklahoma has delegated its authority to regulate train speed to municipalities. Since Congress did not intend for municipalities to have such power, the State of Oklahoma cannot confer that power by delegation. Otherwise, all fifty (50) states could frustrate Congress's intent to provide for a national, uniform system of railroad regulation through the mechanism of delegation. The allowance of control of train speed by thousands of separate local municipalities would annihilate the clearly-stated Congressional intent. H.R.Rep.No.1194, 91st Cong., 2d Sess. 11, 19 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109.

The statute relied on by the Respondents, Okla. Stat. Ann. Tit. 11, § 22-119 (1991), was first enacted in 1890, eighty (80) years

prior to the enactment of the FRSA. The 1890 version of the statute provides in pertinent part, as follows:

> The council shall have power... to regulate the running of railway engines, cars and trucks within the limits of said city, and to prescribe rules relating thereto, and to govern the speed thereof....

Okla. Stat. ch. 15, § 36 (1890). The current version of this statue is virtually unchanged and makes no reference to the FRSA. The limitations on state regulation provided in the FRSA are not contained in the delegation statute. Clearly, the Oklahoma Legislature did not contemplate at any time that the State's regulatory authority under the FRSA was being transferred to municipalities by was of this statute, and no court has interpreted the statute so.

Congressional intent determines whether federal law preempts a particular state or local law. Even if Congress has not expressly displaced state law in a given subject area, state law will be adjudicated preempted if it stands in "actual conflict" with federal law. *California Coastal Common v. Granite Rock Co.*, 480 U.S. 572 (1987). A federal statute that expressly calls for preemption of matters "relating to" the subject matter of that statute preempts "actions having a connection with or reference to" that subject matter. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992).

> Congress did not intend to permit states to exercise their authority under section 434 by delegating it to

> municipalities. Such a reading is completely at odds with the language of section 434, the structure of the FRSA as a whole, and Congressional purpose in adopting the statute.

City of Covington v. Chesapeake & Ohio Ry., 708 F. Supp. 806, 808 (E.D.Ky. 1989).

Even if the City of Fort Gibson's ordinance had been promulgated under the express state constitutional authority (which is was not), it still would be preempted by the provisions of the FRSA. *CSX Transp., Inc. v. City of Thorsby*, 741 F. Supp. 889, 891 (M.D.Ala. 1990); *CSX Transp., Inc. v. City of Tullahoma*, 705 F. Supp. 385, 387-388 (E.D.Tenn. 1988); *Southern Pacific Transp. Co.,v. City of Baldwin*, 685 F. Supp. 601, 604 (W.D.La. 1987); and *CSX Transp., Inc. v. City of Plymouth*, 86 F.3d 626, 629-630 (6th Cir. 1996) (dealing with a crossing blocking ordinance). Federal courts have also uniformly held that any *state* statute which purports to delegate power to the cities to regulate train speed is unconstitutional by virtue of the Supremacy Clause. *Chesapeake & Ohio Ry. Co. v. City of Bridgman*, 669 F. Supp. 823, 825 (W.D.Mich. 1987); *Consolidated Rail Corp. v. Smith*, 664 F. Supp. 1228, 1230 (N.D.Ind. 1987).

The type of delegating statute on which the Respondents rely has been held unenforceable, void, and preempted under the FRSA by every court that has addressed the issue.

The Respondents contend that municipalities can regulate train speed under the FRSA. They do not base this contention on any

court decision which has directly addressed the issue. The Respondents have attempted to distract this Court from the essential issue before this Court - Does the FRSA govern the speed of a train through a city, and, therefore preempt all municipal ordinances and resulting claims based on excessive speed?

CONCLUSION

The Oklahoma Courts' decision is in conflict with the provisions of the FRSA and this Court's decision in *Easterwood*, as well as every other federal court decision which addresses the authority of municipalities to regulate train speed. For the foregoing reasons, Missouri Pacific respectfully requests the Petition for Writ of Certiori be granted.

Respectfully submitted,

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